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RECENT DEVELOPMENTS IN ENGLISH JURISPRUDENCE.

I. The history of the origin, and discussion of the indispensable importance, of the independence of the judiciary, in all free states.

II. Statement of the difference between legislative reforms in England and in the American States.

III. Comments upon some recent decisions in the English courts.

1. Discussion of the conclusive effect of foreign judgments, both as to law and the fact involved, and review of the principles, upon which such conclusiveness is based, and of the cases to some extent.

2. Careful examination of the foundation of the wife's claim to a separate settlement out of her own property, for her own maintenance and support, and that of her children by the husband against whom the settlement is claimed, and at what time a trust or equity on behalf of the children attaches.

We do not here purpose to examine in detail all the late developments, or changes, in so extensive and ever-varying a system of jurisprudence, as that of the English nation. That would require, for its accomplishment, a volume, instead of a brief paper of a few pages. The most we could hope to do, in the present article, is to note some of the more marked changes, in the legislation, or the judicial decisions of that country within the last few months.

I. We shall scarcely need to advert to the sublime mystery, and the incomprehensible phenomena, which are constantly being brought to light, in the advancing life of the jurisprudence of a

great empire like that of England, with its affiliated states of the Anglo-Saxon race, speaking the same language, and acknowledging the same fundamental system of laws. It is one of those vast mysteries of Omnipotence, which no mortal vision can disclose or penetrate, in advance of the footprints of its own onward march; which is one of the most mysterious and incomprehensible of all the works of the Creator, because it has no prototype, and is developed upon no known plan. The puny agencies of humanity, in its short-sighted wisdom, whether as legislators or judges, in carrying forward the successive steps by which the history of the jurisprudence of a great nation is marked, may seem to the agents themselves, to be self-determined and self-supported. But they are in reality, as much, and as obviously, under the immediate control and direction of superhuman, invisible, and incomprehensible forces, as are the earthquake and the storm. The proper appreciation of this truth may serve to make us thoughtful, and circumspect, in what we do; and, at the same time, considerate and reserved, in what we say, in regard to subjects of this character.

We hope it will not be regarded as altogether out of place, in an article of this character, to allude to what appears, in our own country, to be a growing distrust of the judicial department of the several state and national governments; as if there might be more probable danger to be apprehended from the overshadowing influence, and arbitrary decrees of the courts, than from the agencies of either of the other departments of government. It is perhaps not unnatural to find some intemperate criticisms of those decisions of the courts, more nearly affecting exciting political questions; and especially in these exciting times; and more especially, when the courts or the judges so far forget their proper functions, as to travel out of their legitimate sphere, to discuss questions at large, in no way necessarily or appropriately connected with the very points in judgment.

But this, it should be remembered, when it occurs, is the fault of the men, who, for the time being, happen to sit in the place of judgment, and is not a vice naturally inhering in the system itself. It is but one of those uncomely excesses, in the administration of justice, which is liable to occur in all administrative functions, and which should be regarded rather, as an unsightly excrescence, than as any necessary result of judicial administration.

But we trust our readers, especially those of them who are devoted to the active study and enforcement of the laws, in the courts of justice, will not require to be reminded by us, that there is something due to the function of judicial administration, in a free government, altogether above, and quite independent of the respect, which we feel called to bestow, either upon the men who for the time hold the office of judges, or upon the character of the judgments pronounced by them. The one or the other of these may be entitled to no just respect, in themselves considered; and still it may be but the work of an incendiary, or a madman, to attempt to bring them into general disrepute among the masses of the population, whose unquestioning regard for the formal judgments of the courts duly established, is our only guaranty against utter anarchy and wild confusion. In a free government, and especially one resting entirely upon the popular will—where all men are absolutely equal in legal power—it cannot escape the notice of the least observant, that much of that quiet confidence and security which we all so much prize, depends upon the habit of unquestioning submission, which, by long use, acquires the force of necessity, and which pervades all classes alike; and which is as involuntary, almost, as respiration, or the circulation of the blood; and scarcely less indispensable to the vital functions of the state, than are those quiet processes to the life of the individual man. For whatever we may think of the importance of an able and incorruptible executive or legislative department, in carrying forward governmental administration; still, for the security of public or private rights; and for the promotion of public liberty and private happiness; it is undeniably true, that more depends upon a pure and wise administration of the laws by the courts, than upon every thing else. The incorruptible purity; and the firm, resolute, and overawing power of judicial administration; is the very wheel at the fountain, which regulates and controls; and which can alone regulate and control all the other functions of government; and which affords the only abiding and reliable guaranty against public oppression, and private wrong, in all free governments.

That man, therefore, however pure his motives or honorable his purposes, is doing the public but a poor service, who lends his aid, in any manner, to lowering the dignity, or lessening the independence of the judiciary in a state, and especially a free state. That the full development and universal enjoyment of

English liberty by every citizen of the realm, from the highest to the humblest, in fact dates from the Revolution of 1688, and the establishment of William Prince of Orange upon the throne, no careful student of history will question. But there are nevertheless multitudes, fully conusant of this fact, who have no just appreciation of its cause, lying chiefly in the full recognition of the absolute and uncontrollable independence of the English Bench from that date. Before that period the English judges held their commissions only during the pleasure of the crown, and were confessedly dependent upon the government for their pecuniary support, which alone rendered the tenure of their office entirely precarious and dependant: Creasy on the English Constitution 302. So that while Magna Charta, the Petition of Right, and the Habeas Corpus still stood upon the statute book, they were nevertheless but a dead letter, until the independence of the judiciary, both in regard to the tenure of office, and the permanent salary of the judges, was effectually guarantied by the Act of Settlement, in 1688, which was in these memorable words: "After the said limitation shall take effect, as aforesaid, judges' commissions shall be made *quamdiu bene se gesserint*, and their salaries ascertained and established," which is the foundation of all the independence the judiciary enjoys in this country, as well as in the English nation, at the present day: See Creasy 328.[1]

We need scarcely say anything more to the considerate and the prudent upon this important topic. No careful student of English history, who reflects that it cost the English nation, from the establishment of its feudal despotism by William the Conqueror, a struggle of more than half a thousand years, to secure the full guaranty of their liberties, by the recognition of the unqualified independence of the judiciary, by William Prince of Orange; and surely no wise lawyer, or far-seeing statesman; would counsel the abandonment of the very cardinal principle upon which the entire superstructure of English liberty and English jurisprudence now depends. The man who in a free state rejoices at the declension of the independent power of the judiciary may, not inappropriately, be compared to the cockles in the

[1] The very first article in the Bill of Rights of 1688, recognises the fact that James II. (and it is equally true of many of the preceding sovereigns) "did endeavor to subvert and extirpate the laws and liberties of this kingdom, by assuming and exercising a power of dispensing with and suspending the law and the execution of laws, without consent of Parliament." Creasy 317.

Greek fable; and justly be considered, as "singing while his house is burning down." After this imperfect vindication of the absolute and indispensable necessity of the entire independence of the judiciary, in all free states, we shall be the better prepared to estimate the effect of judicial decisions upon the jurisprudence of a nation.

II. The two principal means of the development of jurisprudence in a free state, will always be the legislature and the courts. Hence the sharp conflict in recent times all over the civilized world, almost, between the advocates of legal reform, by means of codification, on the one hand; and on the other, through the instrumentality of the courts; in other words, between legislative and judicial emendation, or adaptation of the law. The former may certainly reckon among its advocates a long list of distinguished names, in the recent and living history of the English nation. For at different times, and in different forms, codification has been able to count among its advocates, apologists, or defenders, the distinguished names of Sir SAMUEL ROMILLY, Mr. AUSTIN, Lord BROUGHAM, Lord CAMPBELL, and the present Lord Chancellor WESTBURY; while on the other hand the English writers only name Lord LYNDHURST, Lord CRANWORTH, Lord KINGSDOWN, and Lord St. LEONARDS, as among its more prominent opposers. But it is obvious to one familiar with the practical workings of English jurisprudence, in the last half century, that the two systems have been there worked in careful combination with each other, the legislature reforming such defects and imperfections of the existing law, as were of too long standing, or too deep seated for the cure of judicial reform; and the courts all the time carrying forward a great work of accommodation and adaptation of the laws to new facts and circumstances. This must be regarded as the practical system of the American States also, with this essential difference in the two countries, that in England their attempts at legal reform, by means of codification, have not, as yet, extended beyond the reference of particular subjects to a Commission, for the purpose of obtaining the report of the frame of a general statute embracing all the law, whether statute or judicial, affecting the special interests embraced in the Commission. This has been done too, in England, generally, and as far as we know, universally, by means of a Commission selected with special reference to knowledge and experience of the defects and wants of the law upon the particular subjects in question.

Such Commissions in England have always been composed of their most learned and experienced lawyers and statesmen; men entirely competent to fill any judicial or executive office in the realm. The result of this course has been to combine all the reforms demanded, without encumbering the new statute with needless refinements and particularities, leaving those to the discretion of the courts, as the contingencies arise. On the other hand the course pursued in the American States of referring the entire subject of statute revision to one Commission, not always selected so much for their known wisdom and experience, as for other and less indispensable qualifications, has more commonly resulted in securing more minuteness of legislative provision, with less opportunity for flexibility and adaptation to the contingencies of practical life and business.

The result has thus been quite the opposite in the two countries. While in English jurisprudence new and independent provisions and changes, sometimes of a very radical character, have frequently been introduced within the last few years, by means of legislation; any thing like thorough codification, upon any subject, has scarcely been attempted; and until the projects of reform of the present Lord Chancellor were brought forward, no serious attempts at general codification have been much discussed, in quarters where they would be likely to become effective in practice. But, on the other hand, in many of the American States, vast codes of laws, covering almost the entire field of general jurisprudence, have been matured and adopted; and these codes afterwards enacted almost entire, without much revision or consideration, in other states. So that while the efforts at codification in England have left the main bulk of the law of the state under the control and supervision of the courts, scattered through numerous volumes, widely apart in point of date, and its purport to be spelled out by the wisdom and the patience of the courts; many of the American States have, to a considerable extent in their own apprehension, reduced their entire jurisprudence to a written code.

The present Lord Chancellor WESTBURY (the late distinguished advocate, Sir RICHARD BETHELL, of the Equity Bar, and sometime Attorney-General), is a bold reformer, and not altogether exempt from being thought obnoxious to the charge of radicalism. It must be confessed, by his admirers and advocates, that he bears the pruning-knife of the law with no sparing hand; and it

is a favorite expression with his lordship, since he finds himself securely seated upon the woolsack, that the law must be effectually "weeded" of all impurities and defects.

We have no time to discuss his lordship's projects in detail here. We have before briefly alluded to the leading scheme of reform introduced by his lordship, at his first setting out upon that career: 3 Am. Law Reg., N. S. 74. We believe his lordship has not met with all the success, as yet, which his sanguine temperament, and long pent-up desires, in that direction, prompted him at first to indulge the hope of accomplishing. It is worthy of remark too, that many of his lordship's reforms in the narrower and more limited spheres of his work of improvement in the law, such as a short statute of limitations in suits upon tradesmen's bills, in the county courts, and the giving of limited equity powers to those courts, have, quite unexpectedly to himself, met with serious, not to say acrimonious opposition from the other Law Lords in the House of Lords, and equally among the profession. The result of all which seems likely to be, that his lordship's fine-drawn, air-built castles of legal reform, may probably prove, in the end, as unsubstantial and as baseless as those of some of his distinguished predecessors in the same office.[1]

III. We shall now allude very briefly to a few of the late English decisions which appear to be of general interest in this country, and which either are not to be republished in this country, or else have not been as yet republished here, and which therefore either will not become, or are not at present, generally accessible to our readers.

1. We allude in the first place to a decision of the late Judge Ordinary of Probate and Matrimonial Causes, Sir CRESSWELL CRESSWELL, made not long before his lamented and sudden decease. We refer to the case of *Crispin* vs. *Doglioni*, 9 Jur.

[1] We have not alluded specifically to the Commission for preparing a Code for India, consisting of some of the most distinguished English judges and lawyers, as that forms rather an exceptional case. It is probably known to our readers, that in the Anglo-Indian empire, each separate people, or population, is governed by distinct laws of its own. The Mahommetan is not subject to the same law as the Christian, or the native inhabitant to the same law as the European, dwelling for the time in those provinces. The purpose of the present Commission is to prepare an entire and complete Code of civil law for the regulation of private rights among the Christian or European population of that portion of the empire. One instalment of the work is already published, and the remainder is in an advanced state.

N. S. 653, where it was held, in accordance with the cleares principle, no doubt, that where one died, domiciled in Portugal his natural son was entitled to the succession to all his personal estate, whether he died testate or intestate, he having obtained a final decree of affiliation in the Supreme Court of Lisbon; and that the proper tribunals of the place of domicil having decided the question of the right of succession and inheritance, the courts of all other countries were bound by that decision.

There is nothing new here in regard to the rule of law governing the right of inheritance so far as personalty is concerned; it is confessedly the law of the place of domicil, which must control the right of succession to personalty, in whatever country it may be found. But there has been a considerable controversy, extending over a long period, in regard to the precise effect of the adjudication of a foreign court, in determining the law of the place where rendered. It has been often said, that such foreign judgment is only *primâ facie* evidence, either of the law or the facts, implied in such judgment. This has been claimed to be the established rule in many of the Continental countries of Europe. But the English law, certainly, has been long evidently tending to a more reasonable conclusion; and the present decision seems to recognise the rule, as clearly established, that such foreign law is conclusively settled by the decision of the foreign court. That being conceded, there is no reason why the judgments of the foreign tribunals should not be equally conclusive, in regard to the facts upon which they are founded. Thus it must result, that all foreign judgments will be held conclusive, the same as a domestic judgment (the jurisdiction both of the parties and the subject-matter being clearly established), unless impeached for fraud or mistake. The record of the foreign court is not indeed conclusive, as a matter of evidence; that is a matter resting *in pais;* and to be determined as matter of fact upon the evidence; but being satisfactorily proved, the contract resulting from the adjudication of the foreign court, is equally conclusive with that of any domestic court, both as to the law and the fact of that case. And in this respect, it will make no difference, whether the judgment in the foreign forum were rendered by the court of last resort or not. It is equally conclusive upon the parties, and equally a merger of the subject-matter in the one case as in the other. It will not indeed be evidence of the law of that country, in other causes, unless rendered by the court of last resort, as it is not in the country where rendered.

All lovers of good law and good reason, cannot but rejoice to see this salutary rule adopted by a judge of such learning and ability as the late Sir CRESSWELL CRESSWELL. His language upon the occasion of giving judgment is worthy repetition and remembrance: "I have come to the conclusion, that it does not belong to this court to sit as a Court of Appeal, from the Portuguese courts." The case is indeed susceptible of being placed upon the special ground of being an adjudication affecting the status of the party, in the place of his domicil, and, therefore, in the nature of a judgment *in rem*, and so conclusive everywhere; but the court assumes no such ground; and it must be regarded as a clear recognition of the rule of the conclusiveness of foreign judgments, except where want of jurisdiction or fraud is shown, as held in *Bank of Australasia* vs. *Nias*, 16 Q. B. 717. This general question is more fully discussed in an editorial chapter in the last edition of Story on Equity Jurisprudence, §§ 1570–1584.

We may here refer briefly to the rule laid down by Lord ELLENBOROUGH, Ch. J., in *Tarleton* vs. *Tarleton*, 4 M. & S. 20, where the effect of a foreign judgment was brought in question, and the counsel for the defendant argued, that the foreign judgment was but *primâ facie* evidence of debt, and might be encountered on their part by contradictory evidence *in pais*. His lordship said: "I thought that I did not sit, at Nisi Prius, to try a writ of error in this case upon the proceedings abroad. The defendant had notice of the proceedings and should have appeared and made his defence." This is precisely the same in effect as the declaration of Sir CRESSWELL CRESSWELL, already stated.

2. There is another question, recently determined by the English courts of equity, which has excited a good deal of criticism there, and which may not improbably occur here; and which, although determined there, apparently, upon grounds more technical than general, is nevertheless one of extensive general application. We refer to the nature of the wife's right to a settlement out of her own estate, to be held for her benefit and support, and that of her children, independent of all interest or control of the husband. The question arose in the case of *Wallace* vs. *Auldjo*, 9 Jur. N. S. 687, where it was determined by V. C. KINDERSLEY, that this claim of the wife impressed no trust upon the property, whereby the children could insist upon its enforcement, in their behalf, after the decease of the mother, unless there had been

during the life of the mother some decree of the court recognising the right, or some recognition of it by way of contract, between the husband and the wife. The learned judge here discusses the question very much in detail, reviewing all the former decisions bearing upon it, and finally comes to the somewhat remarkable conclusion, that it cannot be determined upon any settled principle, or general policy of the law, but must be referred exclusively to the practice of the courts of equity upon the subject.

There is no doubt the whole doctrine of what is called the wife's equity to a settlement, as the learned judge declares, "is an innovation on the common law rights of the husband, which has been introduced by a process of judicial legislation, carried through many years; and that in its application it involves many curious anomalies." This mode of comment, however, seems to us rather an undignified slight, cast, or attempted to be cast, upon a long and well-recognised doctrine of the law; upon so vital a point towards the stability of social life and prosperity, as the separate and independent existence and support of families, than which nothing, probably, is more indispensable to the maintenance of quiet and good order. This half sneer seems to have been made the fulcrum upon which the opinion of the learned judge chiefly turns; viz., that as the whole superstructure of the wife's right to a settlement rested upon a succession of judicial constructions, it was the duty of courts to adopt such strictness of limitation, in their future application of the doctrine, as by all possible means to restrain it within the narrowest boundaries. This is certainly not generally regarded as the most approved rule to apply to questions of this character. The old maxim, *boni judicis est ampliare jurisdictionem* (or as VAUGHN, J., said, in *Collins* vs. *Aron*, 4 Bing. N. C. 233, 235), *i. e.*, *justitiam*, seems to imply, that if there is anything good in the doctrine of judicial construction, it should receive such an application by the courts, as to *preserve* and *extend* its benefits rather than, by narrow constructions and forced limitations, to destroy its useful operation.

The very point in discussion in the case of *Wallace* vs. *Auldjo* was indeed a narrow one; whether, and at what point, the children could claim the benefits of the mother's equity to a settlement on behalf of herself and them; but even this narrow question involved an inquiry into the nature and character of the wife's right. And it would seem to answer no good purpose to show, that the right, whatever it was, came into operation in derogation

of the common law rights of the husband, and was the creation, and the creature of the courts of equity. That is true of all the most salutary rules and doctrines of the existing common law, both of England and America; and upon no subject more than in regard to the rights of married women; and of families, which is the sphere and the proper citadel of women. There is almost no great interest of society, and of social progress and reform, that does not owe much of its present strength and maturity to the fostering care and protection of the courts of equity. And we should very much regret to find any serious attempt, in any quarter, to bring that wise guardianship and protection into disrepute.

The learned judge very frankly confesses, that the rule contended for by the plaintiffs, in favor of the equity of the children to maintain a bill to secure to themselves the benefits of their mother's equity, after her decease, she having elected to claim the settlement, and filed a bill for that purpose during her lifetime, had received the sanction of some eminent equity judges, and among others of Sir JOHN LEACH in *Steinmetz* vs. *Halthin*, 1 Gl. & Ja. 64.

There seems no question, that where the suit of the wife has progressed so far as to an interlocutory decree, and the question of the amount of the settlement was pending before the master or the court; if the wife decease, the children may, by a bill for that purpose, claim the benefit of the equity of their mother. This rule is recognised in all the more recent decisions upon the question: *De la Garde* vs. *Lempriere*, 6 Beavan 344, 7 Jur. 590; *Lloyd* vs. *Mason*, 5 Hare 149; *Osborn* vs. *Morgan*, 9 Id. 432. The rule is thus laid down by Lord ELDON, Chancellor, in *Murray* vs. *Lord Elibank*, 10 Vesey 92. "The principle must be that the wife obtained a judgment for the children, liable to be waived if she thought proper; otherwise to be left standing for their benefit at her death." And in *Lloyd* vs. *Williams*, 1 Mad. 450, there was a contract between the wife and the assignees of the husband, and Sir T. PLUMER, V. C., after a thorough sifting of the authorities up to that time, and an examination of the registrar's book, came to the conclusion, that the rule laid down by Lord ELDON was the true one, and that a contract may stand in the place of a judgment; but where there is neither contract nor judgment, there is no perfected trust which can enure for the benefit of the children; and this rule was reaffirmed by the Vice-Chancellor in *Wallace* vs. *Auldjo*, and has been generally acqui-

esced in by the English equity judges in the late cases, where the question has arisen. We do not regard it as being of sufficient practical importance in this country, to call for any more extended discussion. But we have been forcibly impressed with the justice and plausibility of the rule contended for, by those who advocate the rights of the children to claim the benefit of their mother's equity from the time she elects to enforce it, and manifests that election by filing a bill for that purpose. We think the equity of the children is sufficiently recognised in the admitted doctrine, that the mother cannot claim the settlement on behalf of herself alone; she must, in her bill, demand the settlement for the benefit of her children, by the marriage, as well the afterborn as those then in existence. There could be no more distinct and unequivocal recognition of the equity of the children, as being to some extent subsidiary to that of the mother; and as we here feel at liberty to follow out the doctrines of equity, as the leading of the principles involved shall indicate, we should certainly prefer the rule laid down by Sir JOHN LEACH, to that which seems finally to have prevailed in the English courts of equity.

I. F. R.

(To be Continued.)

ENGLISH IGNORANCE OF AMERICAN INSTITUTIONS.

We are naturally and justly sensitive as to the opinions expressed by the English Press and leading men in Parliament, in respect to the controversy in which our country is engaged. It requires more forbearance than most men possess, to tolerate the judgments pronounced by a set of supercilious, would-be-leaders of public opinion in England, upon matters concerning the condition and future prospects of our country. But we ought not to be surprised at this, when we remember how utterly ignorant most of their leading men are upon the subject of our government and its institutions. Few people in this country can understand how such ignorance can prevail, or the extent to which it actually does prevail, not merely among the uneducated, but with those who undertake to teach others.

We have an instance of this in the lectures of the distinguished